

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

TERESA E.A. TEATER,
Plaintiff,
v.
PFIZER, INC., et al.,
Defendants.

No. 3:05-cv-00604-HU

**FINDINGS AND
RECOMMENDATION**

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1 HUBEL, Magistrate Judge:

2 Presently before the Court is a cost bill filed by Defendants
3 Pfizer, Inc. ("Pfizer") and Warner-Lambert Company LLC ("Warner-
4 Lambert") (collectively, "Defendants"). Defendants seek to recover
5 a total of \$7,206.04 in costs from Plaintiff Teresa Teater
6 ("Plaintiff"). Alternatively, Defendants ask the Court to declare
7 Plaintiff a vexatious litigant and enter an order enjoining her
8 from filing any further lawsuits without first obtaining permission
9 from the Court.

10 Plaintiff objects to the imposition of any costs based on her
11 financial status and inability to pay. Plaintiff represents to the
12 Court that, during the course of this litigation, she has been
13 living off of Social Security benefits and food stamps. These
14 benefits total approximately \$1,249 per month and are used to cover
15 Plaintiff's necessary living expenses, such as food, rent (\$565 a
16 month), utilities (electricity and gas), insurance (car and
17 renter's), and medical costs. In the event the Court awards costs
18 to Defendants, Plaintiff proposes a payment schedule of \$25 per
19 month based on her economic circumstances.

20 For the reasons that follow, I recommend the Court deny
21 Defendants' cost bill.

22 I. FACTS AND PROCEDURAL HISTORY

23 On May 3, 2005, Plaintiff brought this action pro se to
24 recover damages for alleged personal injuries suffered as a result
25 of her ingestion of Defendants' prescription drug Neurontin. On
26 October 19, 2005, the Judicial Panel on Multidistrict Litigation
27 signed a conditional transfer order transferring this case from the
28 District of Oregon to the consolidated proceedings in the District

1 of Massachusetts. Nearly six years later, on May 6, 2011, the
2 Multidistrict Panel issued a conditional remand which remanded
3 Plaintiff's case to this Court.

4 On June 21, 2011, the Court appointed pro bono counsel for
5 Plaintiff and subsequently granted Plaintiff leave to amend her
6 complaint. Defendants moved to dismiss Plaintiff's amended
7 complaint on March 7, 2012, and were partially successful. However,
8 Plaintiff was given another opportunity to amend her complaint and
9 she did so on November 8, 2012. In her second amended complaint,
10 Plaintiff alleged claims for negligence, breach of warranty, strict
11 liability, fraud, violation of Oregon's Unlawful Trade Practices
12 Act ("UTPA"), OR. REV. STAT. § 646.605, and unjust enrichment.
13 Defendants moved for summary judgment soon thereafter.

14 On November 14, 2012, Plaintiff's counsel filed a motion to
15 terminate their on-going pro bono representation, which was the
16 Court imposed deadline for the parties to disclose all expert
17 witnesses. Two days later, Defendants moved for summary judgment,
18 arguing, inter alia, that Plaintiff failed to disclose an expert
19 witness to testify as to specific causation. On February 5, 2013,
20 the Court convened a telephone hearing on pro bono counsels' motion
21 to withdraw. Defendants' counsel agreed to the Court conducting a
22 portion of the hearing on a sealed ex parte basis. Plaintiff's
23 counsel voiced concerns regarding continued representation of
24 Plaintiff. The Court was also advised about a lack of funds to
25 retain or depose experts. Ultimately, the motion to withdraw was
26 denied after Plaintiff and her counsel agreed that a variant of the
27 briefing scheme established in *State v. Balfour*, 311 Or. 434

1 (1991), could be employed at the summary judgment stage of this
2 proceeding.

3 On February 6, 2013, Plaintiff's counsel obtained the expert
4 discovery that occurred during the consolidated MDL pretrial
5 proceedings before Judge Patti Saris in the District of
6 Massachusetts. Two days later, Plaintiff filed a motion to enlarge
7 time to file expert designations pursuant to Rule 6(b). In
8 accordance with prior representations to the Court, Defendants
9 responded to Plaintiff's motion to enlarge in their reply in
10 further support of their motion for summary judgment, which was
11 filed on March 28, 2013.

12 On May 13, 2013, the Court entered a Findings and
13 Recommendation, in which it recommended that both Plaintiff's
14 motion to enlarge time and Defendants' motion for summary judgment
15 be granted. Essentially, the Court's recommendation on Defendants'
16 motion for summary judgment was based on: (1) Defendants pointing
17 to an absence of evidence to support an essential element of
18 Plaintiff's claims, namely specific causation; and (2) Plaintiff
19 failing to come forward with evidence that would be sufficient to
20 support a jury verdict in her favor. On June 6, 2013, Judge Simon
21 adopted the Findings and Recommendation in its entirety and entered
22 a judgment of dismissal. Two weeks later, Defendants filed their
23 cost bill.

24 **II. LEGAL STANDARD**

25 Upon order of the Court, the following items may be taxed as
26 costs:

- 27 (1) Fees of the clerk and marshal;
- 28

1 (2) Fees for printed or electronically recorded
transcripts necessarily obtained for use in the case;

2 (3) Fees and disbursements for printing and witnesses;

3 (4) Fees for exemplification and the costs of making
4 copies of any materials where the copies are necessarily
obtained for use in the case;

5 (5) Docket fees under section 1923 of this title;

6 (6) Compensation of court appointed experts, compensation
7 of interpreters, and salaries, fees, expenses, and costs
8 of special interpretation services under section 1828 of
this title.

9 28 U.S.C. § 1920 (2008).

10 Federal Rule of Civil Procedure ("Rule") 54(d) provides that
11 costs "should be allowed to the prevailing party." FED. R. CIV. P.
12 54(d) (1). "This rule creates a presumption in favor of awarding
13 costs to the prevailing party; if a district court departs from
14 that presumption, it must provide an explanation so that the
15 appellate court can determine whether the district court abused its
16 discretion." *Birkes v. Tillamook County*, No. 09-CV-1084-AC, 2013
17 WL 796650, at *1 (D. Or. Mar. 4, 2013). The district court has
18 "wide discretion" in awarding costs under Rule 54(d). *K-S-H*
19 *Plastics, Inc. v. Carolite, Inc.*, 408 F.2d 54, 60 (9th Cir. 1969).

20 The Ninth Circuit "has approved the following reasons for
21 refusing to award costs to a prevailing party: the losing party's
22 limited financial resources, and misconduct on the part of the
23 prevailing party." *Ass'n of Mexican-Am. Educators v. California*,
24 231 F.3d 572, 592 (9th Cir. 2000) (en banc) (internal citations
25 omitted); *Birkes*, 2013 WL 796650, *1 (stating that "the court may
26 consider the amount of costs involved" and the "plaintiff's ability
27 to pay the costs, including the possibility that the award may
28 leave the plaintiff indigent.")

1 Similarly, in *Stanley v. University of Southern California*,
 2 178 F.3d 1069 (9th Cir. 1999), the district court awarded costs to
 3 the defendants as "prevailing parties" under Rule 54(d)(1), and
 4 denied the plaintiff's subsequent motion to re-tax costs. *Id.* at
 5 1079. The Ninth Circuit "conclude[d] that the district court
 6 abused its discretion, particularly based on the district court's
 7 failure to consider two factors: [the plaintiff]'s indigency, and
 8 the chilling effect of imposing such high costs on future civil
 9 rights litigants." *Id.*

10 **III. DISCUSSION**

11 In her response brief, Plaintiff explains that she is unable
 12 to seek employment due to mental and physical disabilities.
 13 Plaintiff maintains that her mental disabilities are due to her
 14 ingestion of Neurontin. She also provides a handwritten
 15 itemization of expenses that total approximately \$60 more than the
 16 \$1,233 per month she receives in Social Security benefits. The
 17 only exhibits attached to Plaintiff's response brief are (1) a
 18 lease agreement indicating that her rent is payable at the rate of
 19 \$565 per month; (2) an April 11, 2013 medical bill of \$161.10 from
 20 Alegent Creighton Health; (3) a May 20, 2013 medical bill of \$99.50
 21 from Alegent Creighton Clinic; (4) a gas bill of \$21.16 for the
 22 period April 24, 2013 through May 20, 2013; and (5) a monthly
 23 insurance bill of \$144.02 for Plaintiff's 2005 Suzuki Reno.

24 Defendants argue that Plaintiff's submission is insufficient
 25 as a matter of law to sustain her burden of affirmatively
 26 demonstrating that Defendants are not entitled to costs. As
 27 Defendants go on to explain,

[Plaintiff] has merely submitted a brief—'not a declaration under oath'—attaching unauthenticated documentation in an attempt to establish her financial condition. In this case, a declaration under oath is critical given Plaintiff's history of making unsubstantiated assertions in court filings. . . . There are [also] a number of deficiencies in Plaintiff's submission. For example, Plaintiff attaches what appears to be two *medical bills*—one in the amount of \$99.50 and another in the amount of \$161.10. However, there is no suggestion, much less evidence, that these *or other comparable costs* will be incurred going forward on a monthly basis. As another example, Plaintiff claims an expense of \$50 for 'Apollo Storage' and an expense of \$34.89 for 'Renters Insurance,' but does not attach any document to substantiate or explain those expenses.

(Defs.' Resp. Pl.'s Hardship Objection at 3-4) (emphasis added).

The only example Defendants cite in support of their assertion that Plaintiff has a "history of making unsubstantiated assertions in court filings" is *Teater v. City of Oregon City, et al.*, No. 3:05-cv-01546-HU, slip op. at 15 (D. Or. Feb. 9, 2006). In that case, Judge Mosman denied Plaintiff's motion to proceed in forma pauperis and dismissed the action without prejudice because "[t]he facts alleged in the complaint [we]re irrational, and [he was] unable to discern from the allegations any claim having an arguable basis in law or fact." *Id.*

The Court does not view Judge Mosman's preliminary screening of Plaintiff's complaint as evidence that she is untrustworthy. This Court has had occasion to interact with Plaintiff on the record on a few occasions, most recently during the April 24, 2013 hearing on Defendants' motion for summary judgment and the February 5, 2013 hearing on pro bono counsels' motion to withdraw. On each of these occasions Plaintiff was honest, candid, and forthcoming with the Court.

1 Additionally, there is no doubt in the Court's mind that
2 Plaintiff asserted legitimate claims in this proceeding. It is
3 noteworthy that Pfizer entered into a settlement with the
4 Government regarding Warner-Lambert's illegal off-label marketing
5 of Neurontin, the same conduct that formed the basis of Plaintiff's
6 claims. See *In re Pfizer Inc. Shareholder Derivative Litig.*, 722
7 F. Supp. 2d 453, 456 (S.D.N.Y. 2010) ("To settle these charges,
8 Pfizer paid a \$240 million criminal fine and an additional \$190
9 million penalty.") Plaintiff's case was undone by her inability,
10 potentially due to a lack of financial resources, to retain an
11 expert to testify as to specific causation. There are, however,
12 doctors who believe that "Neurontin is an agent that, . . . in
13 vulnerable people, will lead to changes of mood and behavior; and
14 will lead, in certain cases to suicidal intentions, and suicidal
15 acts, and completed suicides." (Findings & Recommendation on
16 Defs.' Mot. Summ. J. at 8) (quoting expert testimony that occurred
17 during the consolidated proceedings in the District of
18 Massachusetts).¹

19 It is true that Plaintiff did not properly authenticate the
20 exhibits attached to her response brief, nor did she submit a sworn
21 declaration subject to the penalty of perjury. However,
22 Plaintiff's procedural errors should not be outcome determinative
23 on the issue of her indigence. Indeed, the Court's appointment of
24 pro bono counsel was predicated on a demonstration of indigence.
25 See *Rayford v. Giurbino*, No. 07-cv-1684, 2008 WL 4997607, at *1
26 (S.D. Cal. Nov. 24, 2008) ("The district court may appoint pro bono

27
28 ¹ In her second amended complaint, Plaintiff alleged that she
suffered similar symptoms after being prescribed Neurontin.

1 counsel for an indigent pro se litigant in a civil appeal pursuant
2 to 28 U.S.C. § 1915(e)(1) in cases presenting exceptional
3 circumstances.”) In her motion for appointment of new pro bono
4 counsel, filed on November 19, 2012, Plaintiff maintained that her
5 only income consisted of \$1,212 in monthly Social Security
6 benefits.²

7 Moreover, the Court has little doubt Plaintiff has provided a
8 fair and accurate portrayal of her financial situation. Defendants
9 challenge the veracity of Plaintiff’s own statements and the fact
10 that Plaintiff’s exhibits were not properly authenticated. They do
11 not claim that the exhibits are in fact not authentic, however, and
12 the Court sees no basis to question their authenticity. It would
13 be quite remarkable if Plaintiff, a 57-year-old woman on
14 disability, who is appearing pro se and who submits only
15 handwritten papers to the Court, had the capabilities to alter or
16 manufacture detailed electronic versions of a lease agreement,
17 medical bills, a gas bill, and an insurance statement.

18 The Court finds that an award of costs against Plaintiff would
19 be unduly burdensome in light of her limited financial resources
20 and her disability.³ The amount required by Defendant represents
21 a significant financial burden for Plaintiff. For example,

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23 ² It must noted that (1) any deviation in Plaintiff’s Social
24 Security benefits is potentially due to a cost-of-living adjustment
25 or an approximation by Plaintiff; and (2) Plaintiff’s rent (at the
26 same address) was only \$300 per month in November 2012, but her May
27 2013 lease agreement indicates that it was increased to \$565 per
28 month.

29 ³ In *Johnson v. Gibson*, No. 3:11-cv-432-AC, 2013 WL 1412824
30 (D. Or. Apr. 8, 2013), Judge Acosta denied a cost bill against a
31 plaintiff whose sole source of income was social security benefits
32 of \$1,000 per month. *Id.* at *2.

1 assuming Plaintiff receives \$1,233 per month in Social Security
2 benefits and pays out \$565 a month for rent and \$144 a month for
3 car insurance (i.e., expenses which Defendants do not appear to
4 contest would be incurred on a monthly basis), she is left with
5 only \$524 dollars a month to cover any additional insurance, food,
6 clothing, utilities, gasoline, housekeeping supplies, personal care
7 products, maintenance, and medical expenses.⁴ In addition, when
8 you compare Plaintiff's alleged symptoms with the expert testimony
9 that occurred during the consolidated proceedings in the District
10 of Massachusetts, it is evident that Plaintiff had a non-frivolous
11 case. But neither Plaintiff, nor pro bono counsel had the funds to
12 retain or depose experts. Under these circumstances, the Court
13 should exercise its discretion and deny an award of costs to
14 Defendants.

15 As to Defendants' alternative proposal—that the Court should
16 enter a pre-filing order—there is insufficient evidence in the
17 record to support a determination that Plaintiff is a vexatious
18 litigant. Defendants only cite two cases where Plaintiff's
19 complaints were screened and dismissed by the district court. See
20 *Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047, 1057 (9th Cir.
21 2007) (stating that "pre-filing orders are an extreme remedy that
22 should rarely be used," and that "[c]ourts should not enter
23 pre-filing orders with undue haste because such sanctions can tread
24 on a litigant's due process right of access to the courts.")

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28 ⁴ The Court rejects any notion that a person who receives disability will not incur medical expenses on a consistent basis.

1 **IV. CONCLUSION**

2 For the reasons stated, I recommend the Court deny Defendants'
3 cost bill (Docket No. 117).

4 **V. SCHEDULING ORDER**

5 The Findings and Recommendation will be referred to a district
6 judge. Objections, if any, are due **October 7, 2013**. If no
7 objections are filed, then the Findings and Recommendation will go
8 under advisement on that date. If objections are filed, then a
9 response is due **October 24, 2013**. When the response is due or
10 filed, whichever date is earlier, the Findings and Recommendation
11 will go under advisement.

12 Dated this 17th day of September, 2013.

13 /s/ Dennis J. Hubel

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DENNIS J. HUBEL
15 United States Magistrate Judge
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